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No. 93-908

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES J. REICH,
Petitioner,
v.

MARCUS E. COLLINS AND THE GEORGIA
DEPARTMENT OF REVENUE,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Georgia

REPLY BRIEF FOR PETITIONER

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Petitioner urges this Court to grant certiorari. The decision below is a defiant rejection of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), and the decision below conflicts with *Harper v. Virginia Dept. of Taxation*, 509 U.S. — (1993), *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18 (1990) and *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912). There is a conflict among state supreme courts. Finally, there is a substantial federal interest involved that directly affects hundreds of thousands of individual citizens. Virtually every factor relevant to the grant of certiorari is presented by this case.

Petitioner files this reply to briefly address Respondent's Brief in Opposition and to inform the Court of recent developments since the Petition was filed.

I. THE DURESS OF CRIMINAL PROSECUTION.

The Commissioner disdains the risk of criminal prosecution claiming Georgia's criminal statute is unconstitutional, and that Petitioner could not be prosecuted for a good faith belief that the tax is illegal. These claims cannot withstand even the slightest of scrutiny.

Georgia has a barrage of vigorous and complete criminal sanctions for taxpayers who fail to make payment of taxes when due. Georgia's criminal statutes impose increasingly severe sanctions, depending on whether willfulness is present or not and depending on the amount in issue. Mere nonpayment of a tax when due is punishable as a misdemeanor under O.C.G.A. § 48-7-2. There is no requirement of willfulness under this statute.

In *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985), the Georgia Supreme Court held that "§ 48-7-2 (a)(1) is unconstitutional on state law grounds to the extent that it authorizes imprisonment for mere nonpayment of income taxes." 326 S.E.2d at 730. Contrary to the Respondent's claim, the court did not declare the entire statute unconstitutional. The emphasis on imprisonment left standing the alternative criminal punishment of a criminal fine in the amount of \$1,000 under O.C.G.A. § 17-10-3. Thus, Petitioner and other retirees still face the risk of criminal prosecution, the stigma and record of a conviction, and a fine of \$1,000 for each nonpayment.

Where willfulness is present, a taxpayer may be prosecuted and imprisoned for a misdemeanor under O.C.G.A. § 48-7-127(c). Similar to the federal scheme, Georgia requires married taxpayers with gross incomes over \$3,000 to file and pay quarterly estimates. O.C.G.A. § 48-7-114. Thus, Petitioner's failure to make his final estimate payment due April 17, 1989 puts him at risk under two different statutes.

Finally, although not applicable to Petitioner, if the amount involved is \$3,000 or more, a taxpayer may be prosecuted for a felony.

Respondent suggests that Col. Reich could not have been prosecuted under these statutes based on *Cheek v. United States*, 498 U.S. 192 (1991). From 1985 through 1988, though, Petitioner could not have been aware of *Cheek* because it had not been decided. Even after *Cheek*, there remains a question whether Petitioner could be prosecuted despite his good faith belief that the tax was illegal. See *Niedringhaus v. Commissioner of Internal Revenue*, 99 T.C. No. 11, Tax Ct. Rep. (CCH) 48,411 (1992) ("There is a difference, however, between a good faith misunderstanding of the law and a good faith belief that the law is invalid or a good faith disagreement with the law").

In any event, even if willfulness was not present, Petitioner has been and remains subject to prosecution under § 48-7-2.

There is no remedy, no procedure, no course of action Petitioner or any taxpayer can take to eliminate these criminal statutes. In Georgia, any taxpayer who does not pay an income tax when due runs the risk of criminal prosecution.

II. IN A SIMILAR CASE, RESPONDENT HAS RECENTLY BEGUN ISSUING REFUNDS UNDER A STATE STATUTE DECLARED ILLEGAL UNDER GEORGIA LAW.

Since the Petition for Certiorari in this case was filed, the Respondent has begun issuing refunds with statutory 9% interest following the December 3, 1993 decision of the Cobb County Superior Court in *Tedder v. Collins*, Cobb Civil Action No. 93-1-5530-28.

In 1992, Respondent amended Revenue Department regulations regarding the sales tax collected on used cars, and beginning in July 1992, the Revenue Department imposed a sales tax on private sales of used cars. In *Tedder*, the trial court ruled that this tax was illegal under Georgia case law. See "Georgia may be refunding

illegal tax." The Atlanta Constitution at B1 (Dec. 4, 1993).

The Commissioner did not appeal this decision. During the public discussion of whether refunds should be given, the Attorney General wrote to the Governor and Respondent:

We strongly recommend against any refunds at this time, unless the State is prepared also to pay refunds in *Reich* and *Beam*, which have a combined \$160 million in potential claims. Payment of refunds in this case could seriously jeopardize our positions in the other pending refund cases.

Letters of December 9, 1993 from Michael J. Bowers to Honorable Zell Miller and Honorable Marcus E. Collins, Sr. See "Bowers opposes refund of vehicle tax fears state would be forced to repay other proceeds," The Atlanta Constitution at p.3 (Dec. 10, 1993). Petitioner could not agree more. The two cases are legally indistinguishable. Georgia law and federal due process mandate similar treatment for federal retirees.

In response to the ruling of the trial court, the Commissioner, acting on the direction of the Governor, began providing refunds to persons who paid taxes under the amended regulation. See 241 Daily Tax Rep. (BNA) at H-2 (Dec. 17, 1993); 5 State Tax Notes (Tax Analysts) at 1531 (Dec. 27, 1993); "Miller says he'll refund \$34 million from tax on used-vehicle sales," The Atlanta Constitution at A1 (Dec. 15, 1993). These refunds are to be paid with statutory interest. "Tax cut to end 'business as usual'," The Albany Herald at 1A (Dec. 18, 1993). The Commissioner has provided a simplified 8" by 5" form for the filing of the refund claims, and the Commissioner has even implemented an information number for taxpayers to call to get information about how to get a refund.

The contrast between this situation and federal retirees is striking. Unlike the retiree cases, the Commissioner did not resist a declaratory suit on the basis that the refund statute provided an adequate remedy at law. Unlike the retiree cases, he did not litigate every issue ad infinitum. Unlike the retiree cases, the Commissioner has provided a specialized refund form and information phone number.

The lesson of these cases is clear. If you live in Georgia and pay a tax that is illegal under the U.S. Constitution, you have no chance of having it refunded. However, if you should be fortunate enough to pay a tax illegal under state tax statutes, a refund with statutory interest at 9% is virtually assured.

III. OTHER RECENT DEVELOPMENTS.

The Court should also be aware that in *Harper v. Virginia Dept. of Taxation*, Case No. CL891080, the Circuit Court of Alexandria ruled on January 7, 1994 that the availability of declaratory relief under Virginia Code Section 8.01-184 satisfied due process and that no refunds were required notwithstanding the provisions of Virginia's refund statute in § 58.1-1826.

Further, the New York State Department of Taxation and Finance has advised citizens in New York that it is unable to pay properly filed *Davis* related refund claims without further judicial guidance because "the U.S. Supreme Court did not give the states a clear answer on the refund remedy in its recent decision in *Harper v. Virginia Dept. of Taxation*" *McQueen, Shop Talk: New York, Montana & Oklahoma Deal with the Harper Decision*, 3 Journal of Multistate Taxation 284 (Jan.-Feb. 1994).

These cases and these circumstances demonstrate the pressing need for guidance from this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioner's initial brief, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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